

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

<b>In the Matter of</b>	)	
	)	
<b>Promoting Efficient Use of Spectrum Through</b>	)	<b>WT Docket No. 00-230</b>
<b>Elimination of Barriers to the Development</b>	)	
<b>of Secondary Markets</b>	)	

**To:   Wireless Telecommunications Bureau**

**COMMENTS OF THE RURAL TELECOMMUNICATIONS GROUP**

The Rural Telecommunications Group (“RTG”) hereby submits comments in response to the Federal Communications Commission’s (“FCC” or “Commission”) *Further Notice of Proposed Rulemaking* (“*Further Notice*”), released as part of its *Secondary Markets Report and Order* (“*Order*”), seeking comment on additional ways that the Commission can promote the use of secondary markets to allow increased access to spectrum.<sup>1</sup> RTG applauds the Commission for adopting important spectrum leasing rules in its *Order*, and agrees that the actions taken in this proceeding are an important “first step” in promoting more efficient use of spectrum, especially in rural areas.<sup>2</sup> As discussed in greater detail below, RTG supports many of the measures taken in the *Order*, which RTG believes will facilitate additional secondary market transactions. However, while the Commission’s *Order* sets out an important framework to facilitate spectrum leasing, secondary market transactions will not occur without proper inducements to both major spectrum holders and rural carriers seeking to access additional spectrum and without the

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<sup>1</sup> *In the Matter of Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 00-230 (October 6, 2003).

implementation of safeguards designed to protect lessees in the event of bankruptcy by a lessor. By continuing to remove regulatory hurdles and by helping to make execution of spectrum leases, transfers of control and assignments less costly and more efficient, the Commission is taking important steps toward its goal of increasing access to spectrum through secondary markets.

## **I. STATEMENT OF INTEREST**

RTG is an organized group of rural telecommunications service providers who have joined together to speed the delivery of new, efficient, and innovative telecommunications technologies to the populations of remote and underserved sections of the country. RTG's members provide wireless telecommunications services such as cellular telephone service and Personal Communications Services ("PCS") to their subscribers. RTG's members are affiliated with rural telephone companies and/or are small businesses serving or seeking to serve secondary, tertiary, and rural markets.

## **II. COMMENT**

### **A. Forbearance from Prior Approval of Certain Transfers, Assignments and Spectrum Leases will Further Stimulate Secondary Market Transactions**

In its *Further Notice*, the Commission seeks comment on whether certain leases and transfers of control and assignments of licenses meeting specific conditions should be eligible for a notification-only consent process.<sup>3</sup> Specifically, the Commission proposes to forbear from prior review and approval of *de facto* transfer leases in which the lessee satisfies eligibility and

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<sup>2</sup> *Id.* ¶ 244.

<sup>3</sup> *Id.* ¶ 237.

use restrictions associated with the licensed spectrum (including foreign ownership requirements) and in which the lease itself raises no competitive or public interest concerns.<sup>4</sup> In attempting to establish a bright-line test to help further define an “anti-competitive” transaction, the Commission proposes to exclude a lease from such notification-only consent processing if the proposed transaction would result in a loss of service in any geographic area currently served by an independent, facilities-based Commercial Mobile Radio Service (“CMRS”) provider.<sup>5</sup> The Commission also proposes to implement a *de facto* spectrum cap in which the FCC would examine the proposed transaction to determine if the proposed lease would give the lessee an “anti-competitive” amount of control over spectrum in a particular market.<sup>6</sup> The Commission also seeks comment in its *Further Notice* on whether a similar notification process should be implemented for transfers of control and assignment of licenses, and if so, whether these same benchmarks proposed in the leasing context should apply to these transactions as well.<sup>7</sup>

RTG supports the Commission’s proposed notification process for *de facto* transfer leases and urges the Commission to adopt a similar notification process for transfers of control and assignments that generally meet the conditions outlined in the *Further Notice*. Currently, the administrative and transactional costs associated with effectuating a secondary market transaction discourage large licensees from entering into leases or assignments with small companies serving rural areas. The adoption of a streamlined notification process for *de facto* leases, transfers of control and assignments will likely reduce transaction costs associated with entering into leases, assignments and transfers, which will in turn, help stimulate secondary market transactions.

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<sup>4</sup> *Id.* ¶ 246.

<sup>5</sup> *Id.* ¶ 258.

<sup>6</sup> *Id.* ¶ 259.

RTG agrees with the Commission that leases and transfers that may negatively impact competition should be excluded from any streamlined notification process. However, the Commission's proposals in its *Further Notice* to establish a specific bright-line test for determining whether or not a proposed transaction would be eligible for streamlined processing is unnecessary and would largely negate the benefits of establishing a notification approval process in the first place. Specifically, the establishment of the bright-line rules contemplated in the *Further Notice* does not take into account the major economic and competitive differences that exist between urban and rural markets. The number of carriers and access to available spectrum varies greatly in urban and rural areas. As the Commission is well-aware, determining whether a transaction is anti-competitive based on the amount of spectrum held by the lessee, assignee or transferee would unduly harm rural companies because the amount of spectrum held by a rural carrier is often not an indicator of the level of competition in rural markets.<sup>8</sup>

As set forth below, RTG supports a different standard. Instead of imposing a *de facto* spectrum cap or looking solely to consolidation when determining if the lease, transfer or assignment raises competitive or public interest concerns, the Commission should modify its notification process outlined in its *Further Notice* to allow interested parties 30 days following announcement of the proposed transaction in the FCC's Public Notices to review and file petitions to deny proposed leases, transfers, and assignments. Once this 30 day petition window has passed, these proposed transactions should then be deemed automatically granted by the FCC. Through this public notice process, and through the Commission's own oversight

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<sup>7</sup> *Id.* ¶ 278.

<sup>8</sup> See *In the Matter of Spectrum Aggregation Limits for Wireless Telecommunications Carriers*, 1998 Biennial Regulatory Review, 15 FCC Rcd 9219 (September 22, 1999).

authority, both the FCC and the public will act to ensure that a lease, transfer or assignment that raises anti-competitive concerns will be thoroughly reviewed by the Commission.

In sum, RTG supports the enactment of a streamlined notification process and believes that such a process will help stimulate secondary market transactions by substantially lowering the cost of such transactions and decreasing the time in which such transactions may be completed. However, instituting a spectrum cap type of measurement or other arbitrary benchmark on utilizing the streamlined notification process will likely have the unintended consequence of actually chilling secondary market transactions in rural areas by giving large nationwide licensees less incentive to expend resources to lease or sell spectrum in smaller, rural areas.

**B. Carving Out an Exception to the Commission's Unjust Enrichment Rules for *De Facto* Transfer Leasing in Rural Areas Will Help Spur Secondary Market Transactions.**

In its *Further Notice*, the Commission seeks comment on whether it should alter the policies adopted in its *Order* to allow non-designated entities to enter into *de facto* transfer lease arrangements with designated entities without being subject to the Commission's unjust enrichment penalties.<sup>9</sup> While RTG recognizes the importance of ensuring that the Commission's designated entity rules are not compromised, the Commission's decision to impose these policies on *de facto* transfer lessees will make *de facto* transfer leasing less viable in rural and unserved areas and will likely prohibit many small rural carriers from accessing much-needed spectrum through such leasing arrangements.

Specifically, requiring a lessee to demonstrate that it would qualify as a designated entity prior to entering into a *de facto* transfer lease currently means that rural companies-- companies

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<sup>9</sup> *Order* ¶ 323.

with limited capital and high operational costs, that are eager to access much needed spectrum-- will be required to make a detailed showing to the Commission that they would qualify as a designated entity at auction.<sup>10</sup> Should these companies fail to make the requisite showing to the Commission, they would be barred from accessing the spectrum until the potential lessor makes an unjust enrichment payment to the Commission. While such unjust enrichment payment obligations would be paid to the FCC by the lessor, in reality, such costs will be passed directly to the lessee. These additional payments would place a heavier burden on a lessee by obligating them to costs in addition to the monthly or annual payments that lessees would already be obligated to pay to the lessor for use of the licensed spectrum. Taken in sum, the Commission's designated entity and unjust enrichment rules currently serve as a major impediment to spectrum leasing in rural areas by saddling rural companies with significant transactional costs and additional administrative delays, and serve as a disincentive to lessors seeking to more quickly execute spectrum leasing.

In order to balance the purpose of the Commission's designated entity and unjust enrichment provisions with the Commission's goal in this proceeding of stimulating the growth of secondary market transactions,<sup>11</sup> the Commission should carve out a limited exception to its unjust enrichment rules. Specifically, the FCC should not impose unjust enrichment penalties on entities entering into a *de facto* transfer lease pursuant to which the lessee will provide service to

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<sup>10</sup> Demonstrating that a potential licensee or lessee meets the Commission's designated entity provisions is a burdensome process that requires significant resources. Following submission of this information, the Commission routinely takes several weeks or months before determining whether or not a potential licensee or lessee meets such requirements. In the context of spectrum leasing, such a burdensome and deliberative process will serve to chill spectrum leasing in rural areas.

<sup>11</sup> *Id.* ¶ 216.

areas defined as “rural” by the Commission in its *Rural NPRM*.<sup>12</sup> Exempting entities from the Commission’s unjust enrichment rules in these limited circumstances would assist companies that are seeking to lease spectrum in rural areas and provide service to currently-unserved portions of larger geographic service areas, and would serve the public interest by helping to eliminate yet another barrier rural companies face in their attempts to access valuable and much-needed spectrum.

The establishment of such a limited exception would address the public policy concerns which have fueled the Commission’s *Rural NPRM*, in which the Commission seeks comment on a number of proposed modifications to its rules to help stimulate the growth of spectrum based services in rural areas.<sup>13</sup> Additionally, the adoption of this limited exception would serve to further the Commission’s mandate to promote the “development and rapid deployment of new technologies, products and services for the benefit of the public, including those residing in rural areas.”<sup>14</sup> By carving out a limited exception to the Commission’s unjust enrichment rules for carriers seeking to enter into *de facto* transfer leases for sparsely populated portions of large geographic service areas, the Commission will take an important step toward achieving its goal of stimulating additional secondary market transactions.

### **C. Information Concerning Spectrum Leases Should be Made Available to the Public**

In its *Further Notice*, the FCC seeks comment on whether the Commission or a private entity should track and maintain databases chronicling secondary market transactions.<sup>15</sup> RTG

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<sup>12</sup> See *In the Matter of Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services*, Notice of Proposed Rulemaking, WT Docket No. 02-381 (October 6, 2003)(“*Rural NPRM*”).

<sup>13</sup> See generally *Rural NPRM*.

<sup>14</sup> 47 U.S.C. §309(j)(3)(A).

<sup>15</sup> *Order* ¶ 224.

supports the establishment and operation of these databases by entities in either the public or private sector. Regardless of how these databases are administered, the Commission should recognize that secondary market transactions will not flourish unless such databases are continually made available for public access. The Commission should not authorize the private administration of such databases that will, in any way, curb public inspection of information regarding secondary market transactions.<sup>16</sup>

**D. In Order to Ensure the Success of Spectrum Leasing, the Commission Must Enact Additional Measures to Protect Lessees in the Event of Bankruptcy by the Lessor**

Outside of the specific proposals contained in its *Further Notice*, the Commission generally seeks comment on “various potential measures, beyond the steps initiated in the *Report and Order*, to promote the use of secondary markets to allow increased access to spectrum.”<sup>17</sup> It is in this context that RTG urges the Commission to adopt additional measures to protect lessees currently constructing or operating wireless facilities in the event that the lessor becomes insolvent and files for bankruptcy protection.

The spectrum leasing rules adopted in the *Order*, and the specific proposals set out in the *Further Notice*, do not contemplate the chilling effect that the possibility of bankruptcy will have on spectrum leasing. Without the establishment of additional bankruptcy protections in the context of spectrum leasing, a lessee currently providing valuable spectrum-based services will almost certainly lose access to such spectrum should its underlying spectrum lease be terminated by a bankruptcy court. In the rural context, it is unlikely that such discontinued services would be replaced, because the ability of small rural carriers to access substitute spectrum in such

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<sup>16</sup> RTG understands that proprietary and confidential information, such as lease price, should remain confidential.

<sup>17</sup> *Order* ¶ 217.



markets is extremely limited. This lack of protection afforded to lessees in the event of bankruptcy will likely serve as the largest deterrent to the execution of spectrum leases and to the construction and operation of wireless facilities in rural areas.

In order to achieve its goals of increasing access to spectrum through secondary market transactions, the Commission must develop measures to ensure that, in the event of bankruptcy by a lessor, a lessee will be allowed to continue to operate its wireless facilities pursuant to its existing spectrum lease. Simply put, without such bankruptcy protections, spectrum leasing will never live up to its potential.

### **III. CONCLUSION**

RTG supports the continued efforts made by the FCC in this proceeding to help stimulate spectrum leasing and transactions in secondary markets. Adoption of a streamlined notification process for certain *de facto* transfer leases and transfers of control and assignments, along with providing *de facto* transfer lessors some relief from the Commission's unjust enrichment provisions in rural areas, will help to further reduce administrative and regulatory barriers that have slowed the development of spectrum leasing in rural areas. However, in order for spectrum leasing to reach its maximum potential, RTG urges the FCC to enact measures to protect lessees in the event that a spectrum lessor becomes insolvent and files for bankruptcy protection. While RTG reminds the Commission that more work is necessary to continue to clarify existing spectrum leasing rules and to remove barriers which still inhibit the growth of secondary market transactions, RTG applauds the Commission for its progress thus far and looks forward to continuing to work with the Commission to ensure that spectrum leasing and secondary market

transactions continue to develop.

Respectfully submitted,

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